

(7) A final regulation published in the FEDERAL REGISTER that provides an opportunity for the submission of further comments, in accordance with paragraph (e)(1) of this section.

(8) Any other public procedure established in this chapter and expressly applicable to the matter.

(g) The record of the administrative proceeding consists of all of the following:

(1) If the regulation was initiated by a petition, the administrative record specified in §10.30(i).

(2) If a petition for reconsideration or for a stay of action is filed, the administrative record specified in §§10.33(k) and 10.35(h).

(3) The proposed rule published in the FEDERAL REGISTER, including all information identified or filed by the Commissioner with the Dockets Management Branch on the proposal.

(4) All comments received on the proposal, including all information submitted as a part of the comments.

(5) The notice promulgating the final regulation, including all information identified or filed by the Commissioner with the Dockets Management Branch as part of the administrative record of the final regulation.

(6) The transcripts, minutes of meetings, reports, FEDERAL REGISTER notices, and other documents resulting from the procedures specified in paragraph (f) of this section, but not the transcript of a closed portion of a public advisory committee meeting.

(7) All documents submitted to the Dockets Management Branch under §10.65(h).

(h) The record of the administrative proceeding closes on the date of publication of the final regulation in the FEDERAL REGISTER unless some other date is specified. Thereafter, any interested person may submit a petition for reconsideration under §10.33 or a petition for stay of action under §10.35. A person who wishes to rely upon information or views not included in the administrative record shall submit it to the Commissioner with a new petition to modify the final regulation.

(i) The Dockets Management Branch shall maintain a chronological list of all regulations proposed and promulgated under this section and §10.50

(which list will not include regulations resulting from petitions filed and assigned a docket number under §10.30) showing—

(1) The docket number (for a petition submitted directly to a center, the list also includes the number or other designation assigned by the center, e.g., the number assigned to a food additive petition);

(2) The name of the petitioner, if any;

(3) The subject matter involved; and

(4) The disposition of the petition.

[44 FR 22323, Apr. 13, 1979, as amended at 52 FR 36401, Sept. 29, 1987; 54 FR 9034, Mar. 3, 1989; 56 FR 13758, Apr. 4, 1991; 62 FR 40592, July 29, 1997; 66 FR 6468, Jan. 22, 2001; 66 FR 12848, Mar. 1, 2001]

EFFECTIVE DATE NOTE: At 66 FR 12848, Mar. 1, 2001, §10.40 was amended in paragraph (g)(7) by removing “§10.65(f)” and by adding in its place “§10.65(h)”, effective Jan. 22, 2001, to Apr. 22, 2001.

#### **§ 10.45 Court review of final administrative action; exhaustion of administrative remedies.**

(a) This section applies to court review of final administrative action taken by the Commissioner, including action taken under §§10.25 through 10.40 and §16.1(b), except action subject to §10.50 and part 12.

(b) A request that the Commissioner take or refrain from taking any form of administrative action must first be the subject of a final administrative decision based on a petition submitted under §10.25(a) or, where applicable, a hearing under §16.1(b) before any legal action is filed in a court complaining of the action or failure to act. If a court action is filed complaining of the action or failure to act before the submission of the decision on a petition under §10.25(a) or, where applicable, a hearing under §16.1(b), the Commissioner shall request dismissal of the court action or referral to the agency for an initial administrative determination on the grounds of a failure to exhaust administrative remedies, the lack of final agency action as required by 5 U.S.C. 701 *et seq.*, and the lack of an actual controversy as required by 28 U.S.C. 2201.

(c) A request that administrative action be stayed must first be the subject of an administrative decision based

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upon a petition for stay of action submitted under § 10.35 before a request is made that a court stay the action. If a court action is filed requesting a stay of administrative action before the Commissioner's decision on a petition submitted in a timely manner pursuant to § 10.35, the Commissioner shall request dismissal of the court action or referral to the agency for an initial determination on the grounds of a failure to exhaust administrative remedies, the lack of final agency action as required by 5 U.S.C. 701 *et seq.*, and the lack of an actual controversy as required by 28 U.S.C. 2201. If a court action is filed requesting a stay of administrative action after a petition for a stay of action is denied because it was submitted after expiration of the time period provided under § 10.35, or after the time for submitting such a petition has expired, the Commissioner will request dismissal of the court action on the ground of a failure to exhaust administrative remedies.

(d) The Commissioner's final decision constitutes final agency action (reviewable in the courts under 5 U.S.C. 701 *et seq.* and, where appropriate, 28 U.S.C. 2201) on a petition submitted under § 10.25(a), on a petition for reconsideration submitted under § 10.33, on a petition for stay of action submitted under § 10.35, on an advisory opinion issued under § 10.85, on a matter involving administrative action which is the subject of an opportunity for a hearing under § 16.1(b) of this chapter, or on the issuance of a final regulation published in accordance with § 10.40, except that the agency's response to a petition filed under section 505(j)(2)(C) of the act and § 314.93 of this chapter will not constitute final agency action until any petition for reconsideration submitted by the petitioner is acted on by the Commissioner.

(1) It is the position of FDA except as otherwise provided in paragraph (d)(2) of this section, that:

(i) Final agency action exhausts all administrative remedies and is ripe for preenforcement judicial review as of the date of the final decision, unless applicable law explicitly requires that the petitioner take further action before judicial review is available;

(ii) An interested person is affected by, and thus has standing to obtain judicial review of final agency action; and

(iii) It is not appropriate to move to dismiss a suit for preenforcement judicial review of final agency action on the ground that indispensable parties are not joined or that it is an unconsented suit against the United States if the defect could be cured by amending the complaint.

(2) The Commissioner shall object to judicial review of a matter if:

(i) The matter is committed by law to the discretion of the Commissioner, e.g., a decision to recommend or not to recommend civil or criminal enforcement action under sections 302, 303, and 304 of the act; or

(ii) Review is not sought in a proper court.

(e) An interested person may request judicial review of a final decision of the Commissioner in the courts without first petitioning the Commissioner for reconsideration or for a stay of action, except that in accordance with paragraph (c) of this section, the person shall request a stay by the Commissioner under § 10.35 before requesting a stay by the court.

(f) The Commissioner shall take the position in an action for judicial review under 5 U.S.C. 701 *et seq.*, whether or not it includes a request for a declaratory judgment under 28 U.S.C. 2201, or in any other case in which the validity of administrative action is properly challenged, that the validity of the action must be determined solely on the basis of the administrative record specified in §§ 10.30(i), 10.33(k), 10.35(h), 10.40(g), and 16.80(a) or the administrative record applicable to any decision or action under the regulations referenced in § 16.1(b), and that additional information or views may not be considered. An interested person who wishes to rely upon information or views not included in the administrative record shall submit them to the Commissioner with a new petition to modify the action under § 10.25(a).

(g) The Commissioner requests that all petitions for judicial review of a particular matter be filed in a single U.S. District court. If petitions are filed in more than one jurisdiction, the

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Commissioner will take appropriate action to prevent a multiplicity of suits in various jurisdictions, such as:

(1) A request for transfer of one or more suits to consolidate separate actions, under 28 U.S.C. 1404(a) or 28 U.S.C. 2112(a);

(2) A request that actions in all but one jurisdiction be stayed pending the conclusion of one proceeding;

(3) A request that all but one action be dismissed pending the conclusion of one proceeding, with the suggestion that the other plaintiffs intervene in that one suit; or

(4) A request that one of the suits be maintained as a class action in behalf of all affected persons.

(h)(1) For the purpose of 28 U.S.C. 2112(a), a copy of any petition filed in any U.S. Court of Appeals challenging a final action of the Commissioner shall be sent by certified mail, return receipt requested, or by personal delivery to the Chief Counsel of FDA. The petition copy shall be time-stamped by the clerk of the court when the original is filed with the court. The petition copy should be addressed to: Office of the Chief Counsel (GCF-1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. The Chief Counsel requests that the purpose of all petitions mailed or delivered to the Office of Chief Counsel to satisfy 28 U.S.C. 2112(a) be clearly identified in a cover letter.

(2) If the Chief Counsel receives two or more petitions filed in two or more U.S. Courts of Appeals for review of any agency action within 10 days of the effective date of that action for the purpose of judicial review, the Chief Counsel will notify the U.S. Judicial Panel on Multidistrict Litigation of any petitions that were received within the 10-day period, in accordance with the applicable rule of the panel.

(3) For the purpose of determining whether a petition for review has been received within the 10-day period under paragraph (h)(2) of this section, the petition shall be considered to be received on the date of delivery, if personally delivered. If the delivery is accomplished by mail, the date of receipt

shall be the date noted on the return receipt card.

(i) Upon judicial review of administrative action under this section:

(1) If a court determines that the administrative record is inadequate to support the action, the Commissioner shall determine whether to proceed with such action. (i) If the Commissioner decides to proceed with the action, the court will be requested to remand the matter to the agency to reopen the administrative proceeding and record, or on the Commissioner's own initiative the administrative proceeding and record may be reopened upon receipt of the court determination. A reopened administrative proceeding will be conducted under the provisions of this part and in accordance with any directions of the court.

(ii) If the Commissioner concludes that the public interest requires that the action remain in effect pending further administrative proceedings, the court will be requested not to stay the matter in the interim and the Commissioner shall expedite the further administrative proceedings.

(2) If a court determines that the administrative record is adequate, but the rationale for the action must be further explained:

(i) The Commissioner shall request either that further explanation be provided in writing directly to the court without further administrative proceedings, or that the administrative proceeding be reopened in accordance with paragraph (i)(1)(i) of this section; and

(ii) If the Commissioner concludes that the public interest requires that the action remain in effect pending further court or administrative proceedings, the court will be requested not to stay the matter in the interim and the Commissioner shall expedite the further proceedings.

[44 FR 22323, Apr. 13, 1979, as amended at 54 FR 6886, Feb. 15, 1989; 54 FR 9034, Mar. 3, 1989; 57 FR 17980, Apr. 28, 1992; 65 FR 56477, Sept. 19, 2000]